In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-342

PYRAMID LAKE PAIUTE TRIBE OF INDIANS, PETITIONER

v.

ROGERS C.B. MORTON, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the court of appeals erred in holding that attorneys' fees and expenses and expert witnesses' fees could not be awarded against the Secretary of the Interior in this case.

Petitioner filed this action in the United States District Court for the District of Columbia challenging the validity of operating criteria adopted by the Secretary to govern the amount of water that could be diverted by the Newlands Reclamation Project from the Truckee and Carson Rivers in the State of Nevada for irrigation purposes. Finding that the Secretary's operating criteria for the water year 1972-1973 were arbitrary and capricious in failing to prevent unnecessary waste within the reclamation district and in unlawfully depriving the Tribe of water, the district court ordered the Secretary to submit amended criteria.

The district court subsequently rejected the new operating criteria proposed by the Secretary and ordered the Tribe to submit appropriate operating criteria that would comply with the court's memorandum and order. After a hearing on the resulting proposed criteria, the court adopted recommendations made by the Department of Justice for the water year 1972-1973 and, with minor modifications, adopted the operating criteria proposed by the Tribe for the water year extending from November 1, 1973, to October 31, 1974. That decision was not appealed.

The district court thereafter granted petitioner's motion for an award of attorneys' fees and expenses and expert witnesses' fees in the amount of $106,197.31, on the ground that 25 U.S.C. 175 and 476 provide the specific statutory authority required by 28 U.S.C. 2412 for assessment of attorneys' fees and expenses and expert witnesses' fees against the Secretary (Pet. App. 33a-39a; 360 F. Supp. 669). The Secretary appealed and the court of appeals (McGowan, Robinson, and Weigel, JJ.) reversed the district court's award (Pet. App. 28a-31a; 499 F. 2d 1095). The court of appeals held that, in the absence of a statute specifically authorizing an award of attorneys' fees and expenses, "the District Court is without general power to award attorneys' fees against the United States" (Pet. App. 30a), and that neither Section 175 nor Section 476, either separately or when read together, constitutes the requisite specific statutory consent.

1. The court of appeals' holding (Pet. App. 30a-31a) that, absent specific statutory authority for such an award, the district court lacked power to award attorneys' fees and expenses and expert witnesses' fees against the United States or its officers, properly applied the

well-established principle codified in 28 U.S.C. 2412. See, *e.g.*, *United States* v. *Worley*, 281 U.S. 339, 344; *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 20-21; *Wilderness Society* v. *Morton*, 495 F. 2d 1026, 1036 (C.A. D.C.), certiorari granted on other grounds *sub nom. Alyeska Pipeline Serv. Co.* v. *Wilderness Society*, No. 73-1977, argued January 22, 1975; *Citizens Committee for the Columbia River* v. *Callaway*, 494 F. 2d 124, 126 (C.A. 9); *Cassata* v. *Federal Sav. & Loan Ins. Corp.*, 445 F. 2d 122, 125-126 (C.A. 7).

Nor is there any conflict concerning the court of appeals' rejection of petitioner's assertions that 25 U.S.C. 175[1] and 25 U.S.C. 476[2] constitute, separately or together, such a specific statutory authorization. That contention was squarely rejected in *United States* v. *Gila River Pima-Maricopa Indian Community*, 391 F. 2d 53, 56-57 (C.A. 9), and *Ricon Band of Mission Indians* v. *Escondido Mut. Water Co.*, 459 F. 2d 1082, 1084-1085 (C.A. 9), to which petitioner makes no reference. Indeed, as the Ninth Circuit declared in *Rincon Band*, Section 175, upon which the Tribe heavily relies, requires the United States neither

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[1]Section 175 provides:

> In all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity.

[2]Section 476 provides in pertinent part:

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> In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interest in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

to provide legal services nor to finance collateral or substitute assistance. Section 476 merely provides the Secretary with the authority to permit Indian tribes to retain independent legal counsel of their choice. As the court of appeals stated (Pet. App. 31a), nothing in Section 476 or its legislative history supports the claim that that section authorizes an award of attorney's fees and expenses against the United States or an officer of the United States acting in his official capacity.

Petitioner's assertion that the Administrative Procedure Act, 5 U.S.C. 701, *et seq.*, provides the requisite statutory consent to an award of attorneys' fees and expenses is also without substance. Even if it is assumed, *arguendo,* that the Act constitutes an implied waiver of sovereign immunity against suit, nothing in the Act can be construed as constituting specific statutory authorization for an award of attorneys' fees and expenses against the United States or an officer of the United States acting in his official capacity. Cf. *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 717-720. Compare, *e.g.*, 42 U.S.C. 1857h-2; *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 484 F. 2d 1331, 1334-1336 (C.A. 1).

2. There is no question or conflict concerning the effect of 28 U.S.C. 2412[3] warranting resolution by this Court.

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[3]28 U.S.C. 2412 provides:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his offical capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States.

Section 2412, as originally enacted in 1948, provided that "[t]he United States shall be liable for fees and costs only when such liability is expressly provided for by Act of Congress" (62 Stat. 973), thereby codifying "the well-known common-law rule that a sovereign is not liable for costs unless specific provision for such liaibility is made by law." H. Rep. No. 308, 80th Cong., 1st Sess., p. A189; cf. Fed. R. Civ. P. 54(d). In 1966 Congress amended Section 2412, at the request of the Attorney General, to provide in its present form that, "[e]xcept as otherwise specifically provided by statute, a judgment for costs * * * but not including the fees and expenses of attorneys may be awarded * * * in any civil action brought by or against the United States or any agency or official of the United States * * *."

As the court of appeals correctly noted (Pet. App. 29a-30a), the legislative history makes it clear that the 1966 revision of Section 2412 did not affect the traditional rule that the United States or its officers were not liable for attorneys' fees absent express statutory authority. The Department of Justice and the courts have consistently construed Section 2412 as confirming that traditional immunity. See, *e.g., Natural Resources Defense Council, supra,* 484 F. 2d at 1333-1335.

3. There is no merit to petitioner's contention that this Court has itself terminated the longstanding immunity of the United States and its officers from liability for attorneys' fees, expenses or other costs where not expressly authorized by statute. Petitioner's reliance upon this Court's *per curiam* affirmance in *Sims* v. *Amos,* 409 U.S. 942 (Pet. 5, 12-14), is unpersuasive, for that case involved state officials and raised no question concerning the immunity of the United States or its officers codified in 28 U.S.C. 2412.

Nor was the traditional rule of immunity as to fees and costs affected by the decisions in *Reconstruction Finance Corp.* v. *J.G. Menihan Corp.*, 312 U.S. 81, and *National Labor Relations Board* v. *Nash-Finch Co.*, 404 U.S. 138, on which petitioner relies (Pet. 16-21). In *Menihan* the assessment was against an independent government corporation launched into the commercial world with unqualified statutory authority "to sue and be sued"; as such it was on an "equal footing with private parties as to the usual incidents of suits in relation to the payment of costs and allowances." 312 U.S. at 85-86. The Secretary of the Interior, however, has been given no such authority. The issue of awarding attorneys' fees and expenses against an officer or agency of the United States was in no way presented in *Nash-Finch*. The Court there held only that 28 U.S.C. 2283 did not prohibit the district court, upon the Board's request, from enjoining the enforcement of a state court injunction limiting a union's picketing activities.

As this Court has recently noted in a related context, "Congress is aware of the issue" whether attorneys' fee awards should be more widely available in federal litigation, and arguments for a departure from the traditional rule here, in suits against the United States or its officers, "are properly addressed to Congress." *F.D. Rich Co.* v. *United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 131.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.